87-1607

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BARRY SILVERSTEIN and DENNIS J. MCGILLICUDDY,
Petitioners,

v.

UNITED STATES,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ROBERT L. WEINBERG
Counsel of Record
LAWRENCE LUCCHINO
JOHN D. CLINE
GREGORY A. BAER
WILLIAMS & CONNOLLY
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000

JOHN GERMANY
HOLLAND & KNIGHT
600 North Florida Avenue
Tampa, Florida 33602
(813) 223-1621

GARY R. TROMBLEY
JAMES H. KYNES
WINKLES, TROMBLEY, KYNES
& MARKMAN, P.A.
Tampa Theater Building
707 North Franklin Street
Tampa, Florida 33602
(813) 229-7918
Attorneys for Petitioners

March 28, 1988

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Does Article III preclude a federal court from adjudicating a motion to disqualify counsel involved in a pending grand jury proceeding before the harm that the motion seeks to prevent has occurred?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No.

BARRY SILVERSTEIN and DENNIS J. MCGILLICUDDY,
Petitioners,

v.

UNITED STATES,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners pray that a writ of certiorai issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit declining to review, for want of an Article III case or controversy, the order by the United States District Court for the Middle District of Florida denying petitioners' motion to disqualify government counsel.

OPINIONS BELOW

The unpublished opinion of the court of appeals is reprinted *infra*, App. 1a-2a.[1] The district court's unreported oral opinion is reprinted *infra*, App. 3a-24a.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 1987. App. 26a. A timely suggestion for

---

[1] References herein to "App." are to the Appendix to the Petition.

rehearing en banc was denied on January 28, 1988. App. 28a.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Art. III, § 2, of the United States Constitution provides in pertinent part:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . [and] to Controversies to which the United States shall be a Party . . . ."

RULES INVOLVED

Rule 3.3(d) of the American Bar Association's Model Rules of Professional Conduct provides:

> "In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse."

STATEMENT OF THE CASE

By subpoenas issued in May 1987, a special grand jury sitting in the Middle District of Florida commanded petitioners Dennis J. McGillicuddy and Barry Silverstein to testify and produce records on June 18, 1987.[2] Robert W. Merkle, United States Attorney for the Middle Dis-

[2] McGillicuddy and Silverstein have been partners in cable television franchising enterprises. These enterprises obtained or sought cable franchises in a number of jurisdictions, including Hillsborough County, Florida, which is within the Middle District. Petitioners had reason to believe that the special grand jury was investigating their business and political activities in Hillsborough County.

trict of Florida, controlled and directed the special grand jury's investigation; his assistant signed the subpoenas.

Petitioners were well acquainted with the United States Attorney. McGillicuddy had been an immunized witness in a case prosecuted by Mr. Merkle a few months before the subpoenas were issued. *United States* v. *Italiano*, No. 85-59-CR-T-(10).[3] At the *Italiano* trial, Mr. Merkle had referred to McGillicuddy's testimony as "inherently incredible" and "inherently unbelievable." He had told the jury that McGillicuddy was "lying." He had implied that McGillicuddy was a thief. Similarly, the United States Attorney had suggested at the *Italiano* trial that Silverstein (who was neither a defendant nor a witness) had participated in giving illegal campaign contributions, that he had engaged in "money laundering," and that corporations in which he was a principal were engaged in a "franchise kiting" operation and a "giant pyramid scheme."[4]

In light of Mr. Merkle's accusations at the *Italiano* trial, McGillicuddy and Silverstein doubted that he could question them impartially before the grand jury or fairly conduct an investigation into their affairs. Moreover, McGillicuddy feared that the United States Attorney would make use of his immunized testimony at the *Italiano* trial in questioning him before the grand jury and trying somehow to develop a case against him.

---

[3] The *Italiano* trial resulted in a conviction on a single count of mail fraud. The Eleventh Circuit recently reversed the conviction under this Court's decision in *McNally* v. *United States*, 107 S. Ct. 2875 (1987), and held that the indictment should have been dismissed. *See United States* v. *Italiano*, 837 F.2d 1480 (11th Cir. 1988).

[4] Petitioners attached the pertinent pages from the *Italiano* trial transcript to their motion to disqualify government counsel filed in the district court. The motion, with attachments, was part of the record on appeal.

With these concerns in mind, McGillicuddy and Silverstein moved to disqualify the United States Attorney from appearing as counsel to question them before the grand jury. Petitioners contended (1) that Mr. Merkle's statements on the record of the *Italiano* trial demonstrated that he could not conduct the grand jury investigation as to them in a fair and impartial manner, and (2) that Mr. Merkle's access to McGillicuddy's prior immunized testimony disqualified him from conducting an investigation into matters related to the testimony.[3]

The district court denied petitioners' disqualification motion as "premature." App. 21a. Petitioners sought expedited review in the court of appeals, either by appeal under the collateral order doctrine as set forth in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), or through writ of mandamus.

The Eleventh Circuit declined to review the district court's order or to address the preliminary question of appealability. Noting that "[a]t the time of the [district] court's ruling on appellants' motions to disqualify, the United States Attorney had not engaged in any of the conduct described in their motions," the court asserted that it "would have to hypothesize a set of facts for review." App. 2a. The Eleventh Circuit did *not* decline review for prudential reasons. Rather, the court of ap-

[3] The motion sought disqualification of Mr. Merkle's *Italiano* co-counsel, Assistant United States Attorney David H. Runyan, on similar grounds. Runyan has recently left the United States Attorney's Office to enter private practice, and petitioners no longer seek his disqualification.

In addition to seeking disqualification of Messrs. Merkle and Runyan, petitioners also sought to quash or modify the grand jury subpoenas duces tecum. The district court denied that aspect of petitioners' motion, and the court of appeals dismissed their appeal as moot, in light of their compliance with the subpoenas. Petitioners do not seek review in this Court of that aspect of the court of appeals' decision.

peals held that Article III "preclude[d]" it from deciding the case. App. 2a.

REASONS FOR GRANTING THE WRIT

The Court should grant the writ because the court of appeals has decided an important question of federal constitutional law in a way that conflicts with applicable decisions of this Court and of the other courts of appeals.

1. THE COURT OF APPEALS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A MANNER THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

The decision of the court of appeals conflicts with this Court's interpretation of the Article III ripeness requirement.

The constitutional doctrine of ripeness turns upon "the fitness of the issues for judicial decision." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 149 (1967); *see Regional Rail Reorganization Act Cases*, 419 U.S. 102, 138 (1974). The essence of constitutional ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Laboratories*, 387 U.S. at 148.[6]

Petitioners' disagreement with the government was anything but abstract. At the time they filed their dis-

---

[6] The *constitutional* aspect of ripeness doctrine, upon which the court of appeals rested its decision, is narrower than the *prudential* aspect. Even where a case meets the requirements of Article III, for example, the Court may decline adjudication so as to avoid "unnecessary decision of constitutional issues." *Regional Rail Reorganization Act Cases*, 419 U.S. at 138; *see Ashwander* v. *TVA*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring). Similarly, the second aspect of ripeness identified in *Abbott Laboratories*—"the hardship to the parties of withholding court consideration," 387 U.S. at 149—is purely prudential and may cause the Court to decline adjudication even where the requirements of Article III are met.

qualification motion, Mr. Merkle had recently branded them, on the public record, as dishonest at best and criminal at worst. The special grand jury under his control had commanded them to appear before it to be questioned by the United States Attorney and his staff. Mr. Merkle had had extensive exposure to McGillicuddy's immunized testimony at the *Italiano* trial and inevitably would be influenced by that testimony in questioning McGillicuddy and investigating his affairs.[7] Thus, contrary to the court of appeals' assertion, the district court had no need to "hypothesize a set of facts"; the factual record was sufficiently concrete to permit adjudication of petitioners' claim that prophylactic disqualification of Mr. Merkle was essential to avert future harm. *Cf. Steffel* v. *Thompson*, 415 U.S. 452, 458-59 (1974); *Doe* v. *Bolton*, 410 U.S. 179, 188-89 (1973).

The court of appeals' crabbed interpretation of Article III renders nonjusticiable, at least at the grand jury stage, prophylactic motions to disqualify counsel. The court's decision drastically limits the enforceability of the ethical constraints on counsel involved in grand jury proceedings. The court's decision is particularly damaging in two respects.

First, the court of appeals' decision undermines an important new ethical duty imposed on prosecutors conducting grand jury proceedings by the ABA's Model Rules of Professional Conduct. These new Rules (unlike the prior ABA Model Code of Professional Responsibility) require the prosecutor to "inform the [grand jury] of all material facts known to the [prosecutor] which will enable the [grand jury] to make an informed decision, whether or not the facts are adverse." Rule 3.3(d); *see id.* 3.8,

---

[7] *See United States* v. *Byrd*, 765 F.2d 1524, 1532 n.11 (11th Cir. 1985) (stating that "it would be unwise to permit an attorney familiar with the [prior] immunized testimony [of a witness] to participate in the trial or preparation of the case" against such witness).

Comment (stating that Rule 3.3(d) governs grand jury proceedings).[8] As the Model Rules are adopted by increasing numbers of states (and as they are assimilated through local court rules as the ethical standards binding in the federal district courts), potential targets or subjects will move before indictment to disqualify federal prosecutors who have demonstrated that they cannot make the balanced grand jury presentation that Rule 3.3(d) requires. The court of appeals' decision precludes this traditional prophylactic remedy for violations of the prosecutor's ethical duty.

Second, the court's narrow reading of Article III creates grave practical problems for federal prosecutors. Government counsel conducting grand jury investigations frequently seek to disqualify attorneys representing multiple witnesses, so as to avert alleged "stonewalling" tactics where jointly represented witnesses refuse to cooperate. Typically, the prosecutor alleges that the witnesses' attorney has a *potential* conflict of interest. *See, e.g., In re Grand Jury Empaneled January 21, 1975*, 536 F.2d 1009, 1010-11 (3d Cir. 1976); *In re Gopman*, 531 F.2d 262, 265-66 (5th Cir. 1976). The court of appeals' holding in this case would render such motions nonjusticiable under Article III until defense counsel's *potential* conflict becomes an *actual* conflict; there is no principled basis for distinguishing (for Article III purposes) between a prophylactic government motion to disqualify counsel for grand jury witnesses, and a prophylactic motion by a witness to disqualify government counsel.

The court of appeals' decision eliminates the traditional prophylactic remedy for asserted ethical violations, at

---

[8] The Model Rules are made applicable by local district court rule to all attorneys practicing before the United States District Court for the Middle District of Florida. The Supreme Court of Florida has adopted the Model Rules, and Local Rule 2.04(c) of the district court provides that attorneys practicing before that court "shall be governed" by the rules adopted by the Supreme Court of Florida to govern members of the Florida Bar.

least in the grand jury context. The Eleventh Circuit's ruling is bad precedent, and it is contrary to the Article III ripeness standards that this Court has established.

II. THE DECISION OF THE COURT OF APPEALS CONFLICTS IN PRINCIPLE WITH DECISIONS OF OTHER COURTS OF APPEALS.

With the exception of this case, the courts of appeals have consistently recognized the power of the federal courts to adjudicate prophylactic disqualification motions in the grand jury context. *See, e.g., In re Special February 1977 Grand Jury*, 581 F.2d 1262, 1263-64 (7th Cir. 1978); *In re Grand Jury Empaneled January 21, 1975*, 536 F.2d at 1011. Although the opinions in these cases did not address the Article III issue directly, the fact that the courts adjudicated the procedural and substantive issues raised by the parties demonstrates their conviction that those issues were ripe for purposes of Article III.

The court of appeals' decision stands in particularly sharp contrast to decisions by the Fifth and Sixth Circuits. In *In re Gopman*, 531 F.2d 262 (5th Cir. 1976), the former Fifth Circuit reviewed an order by a district court that disqualified an attorney from simultaneously representing certain labor unions and three of their officials in a grand jury proceeding. The court rejected the attorney's claim that the government lacked standing to challenge any potential conflict of interest.

In dismissing the standing challenge, the court declared, "We . . . must remember that the court's discretion permits it 'to nip any potential conflict of interest in the bud.'" *Id.* at 266 (quoting *Tucker* v. *Shaw*, 378 F.2d 304, 307 (2d Cir. 1967)). The court held that "it is clear that the *possibility* of a conflict had become great enough for the trial court to exercise its discretion." *Id.* (emphasis added). The court's holding that the district court may disqualify counsel where there is

a mere possibility of a conflict necessarily means that the court considered the possibility of conflict sufficient to satisfy the Article III case or controversy requirement.

Similarly, on facts analogous to these, both a panel of the Sixth Circuit and the court en banc implicitly found that a motion to disqualify an IRS attorney from appearing as government counsel in a grand jury investigation presented an Article III case or controversy. *In re April 1977 Grand Jury Subpoenas*, 573 F.2d 936, *appeal dism'd*, 584 F.2d 1366 (6th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 934 (1979). The panel reversed the district court's order denying the motion and ordered the grand jury investigation terminated because of the *appearance* of a conflict of interest, arising from the *possibility* that the IRS attorney would have a personal interest in justifying his previous recommendations for a grand jury inquiry into the alleged tax evasion, or in making use of secret grand jury information for a civil tax proceeding. The panel declared:

> The evidence does not disclose anything actually unlawful on the part of [the IRS attorney] in accepting his appointment. The District Court made no findings of any actual conflict of interest. We consider only the appearance of a conflict of interest . . . .

573 F.2d at 942.

The Sixth Circuit en banc vacated the panel decision on the ground that the court of appeals lacked statutory appellate jurisdiction to review the district court's order denying the motion to disqualify. 584 F.2d at 1368-71. The en banc court did not, however, suggest that either the panel or the district court lacked *power* to adjudicate the motion to disqualify the prosecutor, and the fact that the court of appeals addressed the statutory appealability issue indicates that it had no doubt about its Article III power to hear the case.

There is no difference, for Article III purposes, between the movants' allegations in *In re Gopman* and *In re April 1977 Grand Jury Subpoenas* and petitioners' allegations in the case at bar. In all three cases, disqualification of grand jury counsel has been sought on the ground that specific facts—here, Mr. Merkle's accusations at the *Italiano* trial and his exposure to McGillicuddy's immunized testimony—create the threat of specific future harm. The Eleventh Circuit's conclusion that it lacked power to adjudicate such a motion conflicts in principle with the decisions of the Fifth and Sixth Circuits.

CONCLUSION

For the foregoing reasons, petitioners respectfully submit that the petition for writ of certiorari should be granted.

Respectfully submitted,

ROBERT L. WEINBERG
Counsel of Record
LAWRENCE LUCCHINO
JOHN D. CLINE
GREGORY A. BAER
WILLIAMS & CONNOLLY
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000

JOHN GERMANY
HOLLAND & KNIGHT
600 North Florida Avenue
Tampa, Florida 33602
(813) 223-1621

GARY R. TROMBLEY
JAMES H. KYNES
WINKLES, TROMBLEY, KYNES
& MARKMAN, P.A.
Tampa Theater Building
707 North Franklin Street
Tampa, Florida 33602
(813) 229-7918
Attorneys for Petitioners

March 28, 1988

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-3434

D.C. Docket No. 86-2-10

IN RE: GRAND JURY SUBPOENAS SERVED UPON:

DENNIS J. MCGILLICUDDY and BARRY SILVERSTEIN,
Appellants.

Appeal from the United States District Court
for the Middle District of Florida

(December 17, 1987)

Before TJOFLAT and ANDERSON, Circuit Judges, and ROETTGER*, District Judge.

PER CURIAM:

In this appeal or, alternatively, petition for writ of mandamus, appellants seek the review of two district court decisions: (1) the court's order denying appellants' motions to quash their grand jury subpoenas, and (2) the court's decision not to disqualify the United States Attorney from questioning appellants before the grand

---

* Honorable Norman C. Roettger, Jr., U.S. District Judge for the Southern District of Florida, sitting by designation.

jury with respect to the subject matter litigated in the trial of *United States v. Italiano*, a criminal proceeding in the district court's Tampa division, or with respect to any other matter.

Prior to the oral argument in this case, appellants complied with the challenged grand jury subpoenas. Consequently, they mooted their appeal/mandamus petition to the extent that it seeks review of the district court's decision overruling their motions to quash subpoena. Accordingly, we do not review that decision.

Whether we consider the district court's decision not to disqualify the United States Attorney as a final appealable order or as action subject to mandamus review, we refuse to review that decision for want of a concrete Article III controversy. *See In Re Grand Jury Proceedings*, —— F.2d —— (11th Cir. 1987) [slip op. 392, Oct. 8, 1987]. At the time of the court's ruling on appellants' motions to disqualify, the United States Attorney had not engaged in any of the conduct described in their motions. We would have to hypothesize a set of facts for review—something Article III precludes us from doing. Our decision, of course, is without prejudice to apellants' right to petition the district court for whatever relief the law may provide if the United States Attorney treats appellants in such a fashion as to warrant the district court's intervention in the exercise of its supervisory power over the conduct of grand jury proceedings.

IT IS SO ORDERED.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No.: 86-2-10

IN RE: GRAND JURY SUBPOENAES INVOLVING
GRAND JURY NUMBER 86-2-10,
DENNIS MCGILLICUDDY, BARRY SILVERSTEIN

Tampa, Florida
June 18, 1987

IN CAMERA
TRANSCRIPT OF HEARING

BEFORE THE HONORABLE WM. TERRELL HODGES
United States District Judge

Court Reporter: Carol J. Jacobs, RPR, CP
Official Court Reporter
Post Office Box 1568
Tampa, Florida 33601

Proceedings recorded by mechanical stenography; computer-assisted transcription.

APPEARANCES:

For the Government:

DAVID RUNYAN
CURTIS FALLGATTER
Assistant United States Attorneys
500 Zack Street, Room 410
Tampa, Florida 33602

For the Movant:

ROBERT L. WEINBERG
Williams & Connolly
Attorneys at Law
Hill Building
Washington, D.C. 20006

JOHN GERMANY
Holland & Knight
600 North Florida Avenue
Tampa, Florida 33602

JAMES H. KYNES
Winkles, Trombley & Kynes, P.A.
Attorneys at Law
Tampa Theatre Building
707 N. Franklin Street, Tenth Floor
Tampa, Florida 33602

[3] (Call to Order of the Court at 4:40 p.m.)

THE COURT: Marshal, this is, until I otherwise order, a closed hearing involving a grand jury matter and will be conducted in confidence under Rule 6 of the Federal Rules of Criminal Procedure.

I have scheduled on telephonic notice to counsel a hearing at this time on the motion of Dennis J. McGillicuddy and Barry Silverstein to quash or modify grand jury subpoenaes and to disqualify government's Italiano trial counsel.

The matter has been styled "In Re: Grand Jury Subpoenaes," involving Grand Jury Number 86-2-10 in the Tampa division of the court over which I have supervisory responsibility.

I notice present as ccunsel Mr. Kynes, Mr. Germany, and mister—

MR. WEINBERG: Robert Weinberg, Your Honor.

THE COURT: —Weinberg. Yes, indeed. Thank you, sir.

MR. WEINBERG: Thank you, Your Honor.

THE COURT: And Mr. Runyan and Mr. Fallgatter, I take it, are here for the government?

MR. RUNYAN: Yes, Your Honor.

One of our secretaries may be trying to get in here. And I just want to let Your Honor know she's bringing [4] something up. We have notified the marshal.

THE COURT: Well, all right.

MR. RUNYAN: Thank you.

THE COURT: Who will speak on the motion in behalf of the movants? Mr. Weinberg?

MR. WEINBERG: May it please the court, Your Honor. I would like to address the motion on behalf of the movants.

The factual allegations set forth in the body of the motion I think are not substantially disputed. In the government's response as filed, essentially the government says that they don't create a ground for relief under the law, that they are legally insufficient for the relief that we claim.

The first of the relief which we seek is disqualification of the United States Attorney Robert Merkle from conducting the grand jury proceedings concerning Mr. McGillicuddy and Mr. Silverstein. And we do that on two grounds.

The first of the grounds is that the duty of objectivity and fairness which is imposed upon the United States Attorney both under the constitution, the rules, and under the principles of legal ethics in conducting a grand jury proceeding cannot be carried out by a United States Attorney who in the course of his duties has taken on the record the position that the witness McGillicuddy is a liar, [5] is inherently uncredible, and has engaged in dishonest activities.

THE COURT: Let me interrupt to ask, Mr. Weinberg, whether in any of the authorities cited on pages 7

and 8 of your brief with respect to that point the court has made an order disqualifying a United States Attorney in the history of the republic?

MR. WEINBERG: Your Honor, I—there certainly have been cases disqualifying United States attorneys, but the—the ground that is asserted here—I don't know of a record like this case. Neither side has cited a case which involves the factual pattern of this case where the United States Attorney has on the record taken the position that the witness who he proposes to examine is a liar and is inherently uncredible.

THE COURT: Well, the answer to my question, I take it, is no?

MR. WEINBERG: I believe there have been cases—that is correct. The cases that we have cited are not cases involving disqualification before indictment. There are cases I'm sure which have disqualified United States attorneys from prosecuting cases where they had a conflict for other—for other reasons. Usually the issue has arisen after indictment.

I would—although it's not in our papers, I would [6] cite to Your Honor the case of United States v Gold, 470 Federal Supplement 1336, a decision by Judge Leyton of the United States District Court for the Northern District of Illinois, where he held post-indictment that the prosecutor had had a conflict of interest and was therefore an unauthorized person in the grand jury room and that therefore the proceedings of the grand jury were invalid.

Had the issue arisen before indictment, I assume Judge Leyton's decision would have been the same, that the prosecutor had a conflict and was disqualified from appearing in the grand jury room.

Needless to say, it's better for the system of justice if a disqualification is remedied in advance rather than having the work of a grand jury go for naught because it's determined after there's been indictment of someone that the proceedings weren't carried on properly.

Certainly motions for disqualification of counsel ordinarily come up before a case rather than after a case. They are more likely to arise in the civil context than in the criminal context, but traditionally they're raised before the case rather than after.

In grand jury proceedings it's certainly not at all uncommon for the government to move to disqualify counsel for witnesses who are prospective defendants. So the idea of disqualification motions in grand jury proceedings is [7] certainly not novel.

And the fact that the record doesn't usually provide a basis for disqualifying the prosecutor before an indictment is returned is I think not a reason why Your Honor shouldn't consider disqualification as a remedy here. Traditionally disqualification is a prophylactic remedy. Counsel is disqualified because of a conflict or inability otherwise to conform to the rules. And they're disqualified before the case is heard ordinarily, rather than after the case is heard. So I think the remedy of disqualification is certainly a traditional remedy.

Your Honor could alternatively quash the subpoena on the ground that the proceedings would be unfair if conducted by a presocutor who has already taken the position that the witness he proposes to call is a liar and is unworthy of belief and is dishonest.

We don't think that the requirements that are placed on a prosecutor to be fair in an ex parte proceeding before a grand jury should be disregarded on a record like this. We don't think the prosecutor should be placed in a position where he's examining a witness as to whom he has already taken that position.

What's perhaps more serious is that the government seems to imply on page 2 of its response that there is a real possibility that it might seek to indict the witness [8] McGillicuddy for perjury. However, read the statements, let's say, they have on page 2 where they say he may not be, may not be, indicted for perjury. Well, that's certainly a suggestion that he may be indicted for

perjury before a grand jury conducted by the very prosecutor who has already called him a liar and unworthy of belief.

It's very difficult to see how a prosecutor in that position could fairly present an allegation of perjury to the grand jury in a fair, neutral, and impartial manner. Indeed, he would be essentially a witness because the alleged perjury would presumably have been in answer to the questions that he propounded to Mr. McGillicuddy in the prior trial or grand jury proceeding, or alternatively in response to questions which he proposed to propound before the grand jury.

I think it would assist the record if Your Honor would call upon the government to specify whether the perjury they're referring to on page 2 for which Mr. McGillicuddy might be prosecuted is perjury allegedly committed prior to the time of this grand jury or perjury that they anticipate they would allege if Mr. McGillicuddy's testimony is the same before this grand jury as it has been on the numerous prior occasions when he's testified.

If their purpose is to bring a perjury case based on Mr. McGillicuddy's prior testimony, the two trials he's testified at and before the grand jury on any of those, then [9] certainly that perjury prosecution before the grand jury can't be impartially handled by a prosecutor who has already said on the record that Mr. McGillicuddy is a liar and uncredible.

If what they're referring to is an anticipation that they will elicit the same testimony before this grand jury and thus set the witness up for a charge of perjury based on that grand jury testimony, again it would be, we submit, totally unfair for Mr. Merkle to be the one conducting that grand jury.

And the purpose of this motion—there's no need for the court to determine whether Mr. Merkle's characterizations and conclusions as to the prior testimony are fair or unfair. The mere fact that he has them is enough to disqualify him. We don't ask Your Honor to litigate the

issue of whether he was right or wrong in the allegations he made for purposes of this proceeding. The mere fact that he made those assertions as to Mr. McGillicuddy we think demonstrates the need for disqualification.

Certainly Your Honor can determine that the allegations were unfair on the record on which they were made. But without reaching that issue, we think the mere fact that the allegations were made provide an ample basis for Your Honor to disqualify the United States Attorney from conducting this investigation.

[10] And we see no significant prejudice to the government were that to occur. Indeed, on the contrary, it may well preserve the integrity of the government's grand jury proceeding, rather than leaving it subject to a motion to dismiss, such as in United States v Gold, and negating a long period of work by the grand jury.

A second reason that Mr. Merkle, we submit, should be disqualified is under the Byrd case in the Eleventh Circuit, because he has been privy to immunized testimony, a great deal of immunized testimony, by Mr. McGillicuddy. The Eleventh Circuit says that counsel who are privy to immunized testimony should not prepare or try a case brought against the immunized witness.

Again, I think it's a fair deduction of what the government says on page 2 of its response that they may well be preparing a perjury case against Mr. McGillicuddy either based on the testimony he's previously given or based on their intention to elicit essentially the same testimony at this grand jury. They seem to concede that they would cover at least some of the same ground they have covered in the past in the course of the questioning they anticipate.

THE COURT: I presume that's because of the possible necessity then, in the event of an indictment, for a Kastigar hearing in order for the government to establish independent source for all of its evidence.

[11] MR. WEINBERG: Well, I don't think that would be a reason for Mr. McGillicuddy to be called be-

fore this grand jury because they propose to immunize him, they say.

THE COURT: I was addressing my question to your asserted proposition under Byrd that it is preferrable for counsel who have been made privy to immunized testimony not to conduct any grand jury proceeding which may lead to the indictment of such a witness. And I was inquiring whether the basis for that suggestion lies in the fact that it would then be necessary for a Kastigar hearing to be conducted for the government to demonstrate an independent source of all of its evidence.

MR. WEINBERG: I think, Your Honor, the Kastigar hearing is necessary whenever an immunized witness has been indicted.

THE COURT: That's precisely my point. That's why I'm wondering what the basis of that proposition is.

MR. WEINBERG: I think it's because the court in Byrd believed that the prosecutor would in fact be disqualified and that the result of the Kastigar hearing would be in favor of the defendant if the prosecutor, who was privy to the immunized testimony, had participated in preparation of the case.

THE COURT: Rather than the proposition that it would simply make it more difficult then to credibly [12] establish independent source?

MR. WEINBERG: Yes. I think it would make it essentially impossible to establish that no use was made. It's not merely a question of independent source. But Kastigar says that the testimony may not be used in any way. And if the prosecutor in framing his questions on cross-examination, for instance, at a trial were to draw on his knowledge of immunized testimony, even though he didn't actually put it in evidence, that would be using it in some way.

So I think that Kastigar aims to put the defendant—or the witness who invokes the Fifth Amendment in exactly the same posture he would have been in as if he had been allowed to invoke the Fifth Amendment.

If the prosecutor knows what the defense is because he's examined the defendant under a grant of the immunity, he obviously has a tremendous advantage over the defendant. I think Kastigar would prohibit a conviction obtained in that manner.

In Byrd, if Your Honor will observe, the government went to great pains to ensure that the grand jury was conducted by a prosecutor who had no evidence of the immunized testimony, no knowledge of it. Indeed, they deliberately destroyed all copies of the transcript, except one which they filed with the court, to preserve the [13] integrity of the prosecutor who was conducting the grand jury that indicted Byrd.

So there the government went to great pains to try and ensure that they would not lose an ultimate Kastigar hearing in the event they lost it at the trial court level. And it was reversed in Byrd because of the precautions that the government had taken.

But I think that the clear indication of the footnote in Byrd is an admonition from the Eleventh Circuit, Don't play with fire, Do not have somebody who is privy to the immunized testimony prepare or try the case.

Now, maybe the government will represent here that there is not going to be any case against Mr. McGillicuddy, they're not investigating him for perjury, he's purely a witness who has no exposure whatsoever. If the government makes such a representation, of course it would change the posture of these proceedings.

But we think on the basis of what the United States Attorney said about Mr. McGillicuddy at the Italiano trial and on the basis of the government's response here that Mr. McGillicuddy isn't in the posture of an ordinary witness. We think that there's every indication that the government intends to—may try and frame a perjury case against him.

Should a perjury case be brought against him and Mr. Merkle have conducted the grand jury proceeding when he was [14] privy to the prior immunized testi-

mony, we thing that Byrd would certainly require relief after an indictment.

But we don't think it's at all fair to the witness to say you have to wait to be indicted before the court will mandate that the government observe their rights. Obviously it's highly destructive and traumatic for a person to suffer the indignity of an indictment which is later dismissed. Great harm has been done at that juncture.

So certainly it's not premature for Mr. McGillicuddy to ask for relief from the court at this time if Mr. McGillicuddy's position is legally correct. If his position is correct, we submit he's entitled to prophylactic relief at this juncture and that he shouldn't be subjected to questioning under the subpoena by Mr. Merkle tomorrow or at any other time.

So for both of those reasons, we respectfully submit that the relief of disqualification should be granted.

We also ask that the subpoena ad testificandum be quashed in its entirety or limited to testimony not previously elicited from Mr. McGillicuddy in order to avoid the risk, which I think is again reenforced by reading page 2 of the government's response, the risk that Mr. McGillicuddy is being called for the purpose of making a perjury case against him, a purpose which the case law prohibits, rather than the purpose for which a grand jury witness is ordinarily [15] called to assist the grand jury.

Indeed, in order to make the immunity application, the use immunity application which the government represents that it intends to make, it has to represent to the court that it's in the public interest to call Mr. McGillicuddy before the grand jury. And one would think it's difficult to make a representation that it's in the public interest to call a witness who the government has characterized as untruthful, as lacking in candor.

Indeed, as Your Honor will recall, one ground that Mr. Merkle asserted for seeking to abrogate the previous transactional immunity under the letter agreement was that Mr. Merkle didn't consider Mr. McGillicuddy candid.

So there may be a considerable question as to how it can be represented by the government that it's in the public interest to immunize and call a witness whom they contend is lacking in candor. And it makes one wonder whether the real purpose isn't to seek to bring a prosecution for perjury against Mr. McGillicuddy.

In addition, Your Honor, we assert that the subpoena should be quashed until such time as it is determined whether Mr. McGillicuddy is entitled to transactional immunity under the previous letter agreement. It's of course our position that the purported abrogation of the agreement was invalid. The case law is clear that the government may not [16] unilaterally abrogate a contractual agreement.

Mr. McGillicuddy testified time after time under that letter agreement. He testified before the grand jury. And he then testified at Mr. Runyan's examination at the U.S. v Anderson trial. And indeed the testimony which Mr. Merkle apparently claimed later lacked in candor was the same testimony solicited by the government—

THE COURT: Immunity from what? What did the letter give him immunity from?

MR. WEINBERG: The letter gave him transaction immunity—

THE COURT: From what?

MR. WEINBERG: —from matters relating to his testimony. The letter is attached as Exhibit B to the motion. And it said the United States Attorney's Office—

THE COURT: I understand what it said. My question is it granted him immunity from what?

MR. WEINBERG: From prosecution.

THE COURT: Well, he's not being prosecuted, is he?

MR. WEINBERG: No. The point is, Your Honor, if he has transactional immunity, then he doesn't have a basis for asserting the Fifth Amendment as to matters to which he has transactional immunity. But since the government has cast doubt on the transactional immu-

nity by purporting to abrogate the letter agreement, he's in the postition where he doesn't [17] know whether he can rely on the letter agreement or not.

THE COURT: Well, then he can assert his Fifth Amendment and the government will be required to make an election as to whether to seek a compulsion order.

MR. WEINBERG: The government has represented that it would seek a compulsion order. But our point, Your Honor, is that a witness is entitled to know where he stands, that the government should not be able to unilaterally abrogate or purport to abrogate a contractual agreement which gave transactional immunity to Mr. McGillicuddy.

And indeed, if Mr. McGillicuddy has transactional immunity as to a question, then he wouldn't be asserting the Fifth Amendment in response to that question because he wouldn't be in jeopardy of prosecution. But Mr. McGillicuddy doesn't really know—

THE COURT: I don't—frankly, it seems to me that that is a specious argument. If he's going to be given use immunity under the statute and believes that he may have transactional immunity under an agreement from prosecution, which would then serve the basis, perhaps, for a motion to dismiss an indictment if there is one, it seems to me that there, number one, would be no basis for a refusal, and, number two, if there was any conceivable basis, it would be premature unless and until an indictment was forthcoming.

MR. WEINBERG: Well, we respectfully submit that [18] it's not premature.

THE COURT: Well, all right. Let's pass on to the next point then.

MR. WEINBERG: Okay. The next point relates to the duces tecum aspect of the subpoena. And it appears to be conceded by the government that they are, as I say, investigating in the political arena, that one of the things they seek is records relating to campaign contributions.

That means we're in an area where there are First Amendment protections.

And under the case law we cite in our memorandum, we believe it's incumbent on government to show a need, to show relevancy, for records which are prima facie protected by the First Amendment. The subpoena in this case gives no indication whatsoever what the government is even investigating.

So we would ask that Your Honor quash the subpoena insofar as it seeks any records relating to political contributions or political campaigns, unless and until the government makes the requisite showing under the First Amendment.

THE COURT: All right. Thank you.

MR. WEINBERG: Thank you, Your Honor.

THE COURT: Mr. Runyan, are you going to respond?

MR. RUNYAN: Yes, sir, if I may, briefly.

[19] THE COURT: All right. I have two questions for you.

MR. RUNYAN: Yes, sir.

THE COURT: You do recite in your response to the motion, as I read it, that prior to the appearance of either of these witnesses the government intends to seek a compulsion order with respect to both. And by that I assume you mean an order of so-called use immunity under Title 18 Section 6001 et sequentes?

MR. RUNYAN: Yes, sir. That is correct. In fact, the hearing had been scheduled this morning before the Honorable Judge Kovachevich. After I was notified by your law clerk yesterday, I cancelled that so that there would not be any waste of her time in case something went wrong today. It is now scheduled for nine o'clock tomorrow morning in front of Judge Kovachevich, at which time the government will in fact seek under Title 18 6001 et seq to formally immunize Mr. McGillicuddy and Mr. Silverstein and compel their testimony before

the grand jury who is sitting and expecting their testimony tomorrow.

THE COURT: And you, I take it, already have the required approval of the Attorney General or his designee?

MR. RUNYAN: That is correct, Your Honor. We have the authorization letter and the motions and proposed orders which have already been drawn up and are just sitting to be [20] presented to Judge Kovachevich tomorrow morning.

THE COURT: What is your response to the last point made in this motion concerning the government's intrusion into areas that may be arguably protected by the First Amendment and the need therefore to demonstrate a compelling need for the evidence?

MR. RUNYAN: Your Honor, I do not believe that the Eleventh Circuit has adopted any type of compelling need standard. In fact, various cases—one that comes to mind is the case that's cited at 781 Fed. 2nd 238, at page 249. It's In Re: A Grand Jury Subpoena Served Upon Joe Doe.

At that time—Mr. Slotnoik, who just recently did the Bernard Goetz case, was the Assistant United States Attorney in that case. There was an issue that came—I'm sorry, he was the defense attorney in that case. An issue came up whereas he claimed that the United States was violating the attorney-client privilege, the Sixth Amendment privilege, by subpoenaing various documents that he possessed for his client who was a Mafiosa-type figure.

The court cites the Brandenberg case. And it goes on to state that even where constitutional rights are involved, the Supreme Court—this is citing from page 249, Your Honor—the Supreme Court has been reluctant to create any constitutional exemptions to the duty to appear before a grand jury and furnish any relevant information or to require [21] a preliminary showing to

be made before persons claiming an infringement of their constitutional rights can be compelled to testify.

I do not believe that the Eleventh Circuit—in fact, they have specifically stated that there is no compelling need standard in this circuit. The associational rights that Mr. Weinberg cites and the cases that he cites in his memo have to do with First Amendment associational rights. Those were tax protestor cases in which a very broad and vague subpoena was issued to banks which quite candidly sought to obtain the identities of some of the tax protestors in order to seek their identity, to find out who was in this group.

This is not the same, Your Honor. These are simply—this is a subpoena—it's interesting that Mr. Weinberg interprets it as being as broad as it is. That was going to be our next subpoena, for more of the type of records that he has already brought to the court's attention, those being campaign contributions. But anyways, if you look at that, all we're doing is seeking the campaign contribution of a partnership; that is Phoenix Associates II, a partnership which I'm sure Your Honor is still aware from the Italiano trial.

These are records that quite candidly are probably all subject to public scrutiny and public record. They would be campaign contributions that would have to be in fact [22] delineated and listed by the candidate, as well as lobbying expenses, which I'm sure, although I have not done the—I have not done the research, but I'm sure there is also federal guidelines and federal rules and regulations that require lobbying expenses to be somewhere in public record designated and delineated.

All the grand jury is doing in this subpoena is asking for records that are already a source of public knowledge in some repository. We are asking the partnership, Phoenix Associates II, through either Mr. Silverstein or Mr. McGillicuddy, who is the custodian of those records, to bring them with them.

I cannot possibly envision that would in any way chill any type of First Amendment protection, that they will in the future no longer make political contributions or no longer will engage in lobbying activities on behalf of the cable television network. That simply is not what has been envisioned.

The case that I have just recently cited here, Your Honor, about the attorney-client privilege, documents in the attorney-client privilege, the court stated that there was no Sixth Amendment right, that they were not going to make any higher—put any higher burden on the government to establish any type of relevancy before those records were in fact subpoenaed before the grand jury. [23] And they cite at length at page 249—and I have a copy of the case if Your Honor wishes to read it—the fact that the powers of the grand jury are not unlimited, but the public has a right to every man's evidence except those persons protected by constitutional common law or statutory privilege. Clearly there is none here. There may be a constitutional right to give campaign funds, but there's no constitutional privilege that once they're given they should not be divulged if in fact a grand jury legitimately is seeking into some type of investigation where that evidence will in fact assist the grand jury in determining has there been a crime committed or hasn't there been a crime committed.

And that's all we're asking, that the grand jury be given the opportunity to obtain every man's evidence and in this case the evidence of Phoenix Associates II concerning their lobbying efforts, concerning their political contributions.

That would be my response.

If Your Honor wishes me to address the other two points, I can. There has been a recent case that has basically—in the Eleventh Circuit—that basically contradicts Byrd. And it's interesting because the defense attorney in that case—and the case is United States versus

Caporale, C-a-p-o-r-a-l-e, which is at 806 Fed. 2nd 1487, [24] discussed on page 1518. The court—and I'm quoting—the court says the essence of Mr. Gatman, who is the defendant—defense attorney's argument is that the government can never establish an independent source when the prosecutor has read the immunized testimony prior to trial. They go on then to discuss the fact that the government can in fact do that if they sustain the Kastigar burden. In this case the government did sustain their Kastigar burden. And even though that prosecutor read the immunized testimony, as in this case Mr. Merkle and myself have read and even listened to the immunized testimony, that certainly was not a bar to bring an indictment in the future.

And again, this is all premature and all anticipatory. The government is not about to sit up here and tell Your Honor we're going to indict Mr. McGillicuddy, but I'm not going to tell you we're not, one or the other, because it's premature and it's all anticipatory, something that does not have to be argued at this point.

If in fact he ever is indicted, then the government would have to sustain their Kastigar burden. If he ever is indicted, the government would have to, I guess—would have to argue that there was no prosecutorial misconduct which—if that was a basis to dismiss the indictment. But that is all anticipatory. We don't know if Mr. McGillicuddy will ever, if ever, be indicted.

[25] So the other two portions, the other two issues, that Mr. Weinberg has brought to the court's attention are all anticipatory, asking Your Honor to make an anticipatory ruling and premature rulings on something that may never come to be.

If Mr. McGillicuddy is not indicted, there will never be a Kastigar problem, there will never be a fairness problem, there will never be a prosecutorial misconduct problem. And we just don't know that at this point.

And unless Your Honor wishes me to address some other issue, that's basically all I have.

THE COURT: All right. No. Thank you.

MR. WEINBERG: May I briefly respond, Your Honor?

THE COURT: All right, Mr. Weinberg.

MR. WEINBERG: Your Honor, the Caporale case is not cited in the government's papers. We would request that we be able to submit a memorandum the first thing in the morning.

Byrd appears to be the case on which the government chiefly relies. Byrd is certainly the authority which both sides discuss in the memorandum. And I think the language of the Eleventh Circuit there, its admonition, is very strong, that the prosecutor who has read the immunized testimony should not participate in the preparation or trial of the case. So we would ask for the opportunity, both for [26] Your Honor and ourselves, to be able to consult the Caporale case and submit a one-page memorandum on that tomorrow morning, Your Honor.

With regard to the First Amendment issue, there was a big if. I believe Mr. Runyan argued that the government is entitled to this information if it is legitimately seeking information to which it's relevant. But the government has made no representation as to the purpose for which it's seeking this information or to which it's relevant.

And the point made in our memorandum is not this absolute privilege, but that the burden is shifted where the government is going into the First Amendment area and they therefore must make some showing of relevance or need. And we respectfully submit that up to this point Mr. Runyan's argument hasn't demonstrated any relevance or need.

We would finally ask that Your Honor ask the government to clarify on the record whether its reference to a possible perjury prosecution on page 2 of its memorandum was to perjury committed at the Italiano trial or the Anderson trial or the grand jury or alternatively the testimony they anticipate eliciting if the proceedings un-

der the current grand jury subpoena are permitted by the court to go forward.

THE COURT: All right. Thank you, counsel.

Well, I have now considered the motion. I have [27] considered carefully the memoranda submitted by the parties and have also at this point heard the argument of counsel. And I am prepared to and do overrule and deny the motion in all of its aspects.

It seems to me, with the possible exception of the question raised concerning the First Amendment, that the motion is at best premature in all of the asserted grounds and can only be appropriately determined, should any of these points ever be germane, in the event of an actual indictment, one or the other, of the two witnesses.

Frankly, the point which initially intrigued me and the main reason I asked that counsel come for purposes of this argument has to do with the assertion that inasmuch as the subpoena would seek, if not in terms, through its scope, the production of records concerning campaign contributions that it implicates First Amendment considerations which would under some authority at least trigger an obligation on the part of the government to demonstrate a need for enforcement of the subpoena as distinguished from perhaps alternative sources for the same information.

Upon further reflection, however, with respect to the authorities cited and the argument of counsel, I'm inclined to agree with the government's position. The authorities which are cited in the movant's brief essentially have to do with associational rights and cases in which the [28] enforcement of a grand jury subpoena could well have immediate chilling effect upon persons who might otherwise desire to associate themselves with some group or organization or the person upon whom the subpoena has been served. It seems to me that there is no such chilling effect in this instance.

Even assuming, which I am for purposes of this motion, that the subpoena is framed in such a way as to

reach records of campaign contributions, as Mr. Runyan has just pointed out, I think appropriately, with respect to the matter of campaign contributions, they're not only a matter of public record, they're required by law to be so from the standpoint of the recipient or the candidate, which is a distinguishable situation from the records of a committee, association or group with respect to its membership or the like.

And it does not seem to me in those circumstances that the government should be required to demonstrate in advance of subpoenaing ordinary business records which might indeed include records of campaign contributions or the like that any prior demonstration of need is required. And I am not aware of any authority which says so. As I say, the authorities which are cited with respect to that proposition have to do with associational interests.

So I will and do deny this motion in all of its [29] aspects and will simply endorse that denial on the face of the motion itself by reference to the record of this hearing as the basis for my ruling.

(Pause.)

And I have made a written endorsement on the motion.

Mr. Gay, here is the file jacket. It should probably be entrusted to government counsel.

I take it, Mr. Runyan, you're returning to Tampa this evening or early in the morning?

MR. RUNYAN: Yes, sir, very soon.

THE COURT: All right. This is an in camera file which should be returned to the criminal section of the clerk's office in Tampa for filing in camera.

MR. RUNYAN: I would be happy to do that Your Honor.

Your Honor, there is one thing. The grand jury subpoenaes call for the appearance of McGillicuddy and

Silverstein today. I assume since we had a hearing that that subpoena would be carried over until tomorrow. I don't think there's any dispute on that. I haven't had a chance to ask these gentlemen.

THE COURT: I would assume—

MR. WEINBERG: I was rising for the purpose of requesting that the court stay its ruling and stay the subpoenaes long enough to allow us to apply to the circuit, [30] to the Eleventh Circuit, for a stay pending an expedited appeal. We think substantial issues are raised by the motion. The government has previously postponed these subpoenaes on its own motion from May to June. And we would ask that Your Honor give us 72 hours to apply to the circuit for a stay.

THE COURT: What does the government say to that?

MR. FALLGATTER: Your Honor, if I might respond.

THE COURT: Mr. Fallgatter.

MR. FALLGATTER: I have researched this particular issue in recent matters and it's clearly the government's position that the only mechanism by which they can take an appeal of this ruling is to seek a contempt citation and thereafter appeal. The only vehicle they might utilize to seek a stay at this time would be to ask for a certified appeal under 1291, which of course is—28 U.S.C. 1291—restricted by statute to civil proceedings for which there is a controlling question of law. None of those factors apply here. And the law in our circuit is quite clear that the mechanism to preserve appeal is to obtain a contempt citation. We would ask the court to require them to adhere to that practice.

MR. WEINBERG: Your Honor, I would respectfully cite to the court in opposition the Eleventh Circuit case, the case of the Slaughter v Emerson, 694 F. 2nd 1258, Eleventh [31] Circuit, 1982, which involved an appeal from the denial of a motion to quash two federal grand jury subpoenaes. And that case doesn't indicate there

was any issue raised as to appealability. Certainly the government would be free to argue that to the circuit. We submit there's a substantial basis under the Slaughter case for taking an appeal from a denial of a motion to quash such as this.

Particularly the issue of disqualification really can only be raised at this time by an appeal at this time. It's difficult to see how it would be raised by a witness—

THE COURT: Well, the record will reflect that I've been requested to defer enforcement of the subpoena to permit review by the Court of Appeals, and I will decline that motion, Mr. Weinberg. I don't mean thereby, obviously, to attempt to thwart any application you may wish to make to the Court of Appeals, but I decline to stay my order under the circumstances.

It seems to me that government counsel is probably correct that the only appropriate appellate vehicle would be from a contempt citation. But even if that were not the case, to stay the return of a subpoena before the grand jury which is undertaking a criminal investigation is a step that I would take only on the most compelling grounds, and I don't see any in this case.

I'll deny that motion.

[32] MR. WEINBERG: Thank you, Your Honor.

THE COURT: All right. Thank you, counsel. We'll be in recess—

THE MARSHAL: All rise.

THE COURT: —till nine o'clock in the morning.

(Thereupon, at 5:35 p.m. these proceedings were concluded.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Carol J. Jacobs June 18, 1987
CAROL J. JACOBS, RPR

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 86-2-10

IN RE: GRAND JURY SUBPOENAS INVOLVING
GRAND JURY NUMBER 86-2-10
DENNIS MCGILLICUDDY, BARRY SILVERSTEIN

MOTION

Considered and heard on the record on June 18, 1987, and denied for the reasons stated at that time.

June 18, 1987 /s/ Wm. Terrell Hodges

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-3434

Non-Argument Calendar

D.C. Docket No. 86-2-10

IN RE: GRAND JURY SUBPOENAS SERVED UPON:
DENNIS MCGILLICUDDY AND BARRY SILVERSTEIN,
Appellants.

Appeal from the United States District Court for the
Middle District of Florida

Before TJOFLAT and ANDERSON, Circuit Judges, and ROETTGER *, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Circuit Rule 34-3;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the

---

* Honorable Norman C. Roettger, Jr., U.S. District Judge for the Southern District of Florida, sitting by designation.

District Court denying appellant's motions to quash their grand jury subpoenas is MOOT since the appellants complied with the challenged grand jury subpoenas; the order of the District Court denying appellant's motion to disqualify the U.S. Attorney was not reviewed by this Court for want of a concrete Article III controversy.

Entered: December 17, 1987
For the Court: Miguel J. Cortez, Clerk

By: /s/ Warren T. Godfrey
Deputy Clerk

Issued as Mandate: Dec. 17, 1987

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-3434

IN RE: GRAND JURY SUBPOENAS SERVED UPON:
DENNIS J. MCGILLICUDDY AND BARRY SILVERSTEIN,
Appellants.

Appeal from the United States District Court for the
Middle District of Florida

ON PETITIONS FOR REHEARING AND
SUGGESTIONS OF REHEARING IN BANC

(Opinion December 17, 1987, 11 Cir., 198—, — F.2d—).
(January 28, 1988)

Before TJOFLAT and ANDERSON, Circuit Judges,
and ROETTGER *, District Judge.

PER CURIAM:

(✓) The Petitions for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions for Rehearing In Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Gerald Bard Tjoflat
United States Circuit Judge

---

* Hon. Norman C. Roettger, Jr. U.S. District Judge for the Southern District of Florida, sitting by designation.

(2)

No. 87-1607

In the Supreme Court of the United States

OCTOBER TERM, 1987

BARRY SILVERSTEIN AND DENNIS J. MCGILLICUDDY,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

EDWARD S.G. DENNIS, JR.
Acting Assistant Attorney General

SARA CRISCITELLI
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

9 pp

QUESTION PRESENTED

Whether, in the absence of any coercive government action against petitioners, the court of appeals erred in declining to review the denial of petitioners' motion to disqualify the United States Attorney from participating in a grand jury investigation of matters that may relate to petitioners' affairs.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution and statute:

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1607

BARRY SILVERSTEIN AND DENNIS J. MCGILLICUDDY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is reported at 835 F.2d 1439 (Table).

JURISDICTION

The judgment of the court of appeals (Pet. App. 26a-27a) was entered on December 17, 1987. A petition for rehearing was denied on January 28, 1988 (Pet. App. 28a). The petition for a writ of certiorari was filed on March 28, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In May 1987, petitioners Silverstein and McGillicuddy received subpoenas to testify before and deliver records to a federal grand jury sitting in the Middle

District of Florida. Petitioners moved the district court to quash those subpoenas and to disqualify the United States Attorney from participating in any grand jury investigation involving petitioners. Petitioners based their motions on petitioner McGillicuddy's contacts with the same United States Attorney in the case of *United States* v. *Italiano*, No. 85-59-CR-T-(10) (M.D. Fla. 1987), rev'd, 837 F.2d 1480 (11th Cir. 1988), in which McGillicuddy participated as an immunized witness. Petitioners argued that the United States Attorney was not qualified to conduct the current investigation because (1) he termed McGillicuddy's testimony "inherently incredible" during the *Italiano* trial, and (2) he was familiar with McGillicuddy's prior immunized testimony and might make improper use of that testimony before the grand jury. Pet. App. 5a-9a.

The district court denied both motions. The court noted that petitioners' motions were "at best premature," and that petitioners' contentions could be renewed in a challenge to "an actual indictment" of petitioners if there should be one (Pet. App. 21a). The district court also declined to stay enforcement of the subpoenas. The court later entered orders granting immunity to petitioners under 18 U.S.C. 6002 and compelling them to testify (Pet. App. 15a-16a). Petitioners complied with the grand jury subpoenas, testified before the grand jury, and thereby rendered moot their motion to quash the subpoenas (*id.* at 2a).[1]

2. In a brief unpublished order, the court of appeals dismissed petitioners' appeal from the denial of their motion to disqualify the United States Attorney (Pet. App. 1a-2a). The court of appeals held that petitioners'

---

[1] Petitioners no longer challenge the district court's denial of their motion to quash the subpoenas (see Pet. 4 n.5).

challenge did not present a justiciable Article III case or controversy. But the court of appeals made it clear that its decision was "without prejudice to [petitioners'] right to petition the district court for whatever relief the law may provide if the United States Attorney treats [petitioners] in such a fashion as to warrant the district court's intervention in the exercise of its supervisory power" (*id.* at 2a).

ARGUMENT

The court of appeals' judgment is correct, and that court's unpublished order does not conflict with the decision of any other court of appeals. Thus, no further review is warranted.

1. Article III of the Constitution limits the "judicial Power" of federal courts to "Cases and Controversies." That limitation is designed to ensure that the courts issue judgments only in specific, concrete controversies between interested parties. In the context of grand jury proceedings and investigations, the types of justiciable controversies are well settled. Once a grand jury has returned an indictment, an aggrieved individual may move to dismiss the indictment on a variety of grounds. See *Wayte* v. *United States*, 470 U.S. 598, 608 (1985). Prior to an indictment, a person may challenge a coercive governmental action such as the issuance of a subpoena. See *Cobbledick* v. *United States*, 309 U.S. 323 (1940). But in the absence of coercive action, an individual has no right to compel a federal court to exercise authority over an investigation being conducted by the Executive Branch.

This principle has been clear since *Laird* v. *Tatum*, 408 U.S. 1 (1972). In *Laird*, the question was "whether the jurisdiction of a federal court may be invoked by a complainant who alleges that the exercise of his First Amendment rights is being chilled by the mere existence, without

more, of a governmental investigative and data-gathering activity" (*id.* at 10). This Court held that a federal court lacks such jurisdiction because the government's activities are not "regulatory, proscriptive, or compulsory in nature" (*id.* at 11). To permit review in the absence of any concrete harm or coercive government action would make the "federal courts as virtually continuing monitors of the wisdom and soundness of Executive action" (*id.* at 15).

The principle of *Laird* has great force in the context of a grand jury proceeding conducted by a United States Attorney. As the Court noted *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418, 430 (1983) (footnote omitted), a grand jury depends "largely on the prosecutor's office to secure the evidence or witnesses it requires." Thus, the United States Attorney, like the grand jury, "must be free to pursue [his] investigations unhindered by external influence or supervision." *United States* v. *Dionisio*, 410 U.S. 1, 17 (1973).

Of course, a person who is subject to some coercive governmental action may challenge that action. Here, for example, petitioners presented an Article III controversy to the district court when they moved to quash the grand jury subpoenas. And they could have obtained appellate review of the district court's denial of their motion to quash if they had refused to comply with the subpoenas and had been held in contempt. See *United States* v. *Ryan*, 402 U.S. 530, 533 (1971). The claims petitioners assert before this Court, however, present no case or controversy arising from the grand jury investigation being led by the United States Attorney.

If petitioners are served with new subpoenas, they may move to quash those subpoenas. Or if they are indicted, they may move to dismiss the indictment. But they may not obtain an order designating who may lead a grand jury investigation that may, in some unspecified way, relate to

their affairs. Any concern or resentment that results from being associated with a criminal investigation is simply " 'part of the social burden of living under government.' " *Petroleum Exploration, Inc.* v. *Public Service Comm'n*, 304 U.S. 209, 222 (1938) (citation and footnote omitted). See also *United States* v. *Richardson*, 418 U.S. 166, 173 (1974) (citation omitted) (federal courts do not have Article III authority to address " 'generalized grievances about the conduct of government' "). Cf. *FTC* v. *Standard Oil Co.*, 449 U.S. 232 (1980).

There is no authority in the courts of appeals supporting petitioners' argument that their motion to disqualify the United States Attorney presented a case or controversy. The only reported decision cited by petitioners that involves a motion to disqualify a prosecutor conducting a grand jury inquiry is *General Motors Corp.* v. *United States* (*In re April 1977 Grand Jury Subpoenas*), 584 F.2d 1366 (6th Cir. 1978) (en banc), cert. denied, 440 U.S. 934 (1979). In that case, the court of appeals held that it had no jurisdiction to review an order denying a motion to disqualify a government lawyer from conducting a grand jury investigation. In dismissing the appeal for want of jurisdiction, the court did not discuss whether General Motors' motion to disqualify presented an Article III controversy. Accordingly, there is no conflict between the Sixth Circuit's decision in *General Motors* and the decision in this case.

2. Even if a motion to disqualify a United States Attorney from leading a grand jury investigation were justiciable in some cases, petitioners' motion is not. Petitioners do not claim that the United States Attorney has acted improperly in the current investigation; rather, they seek his removal as a "prophylactic" measure to "avert future harm" (Pet. 6). But petitioners have not shown that the "harm" they seek to avoid is anything other than purely speculative. They currently are under no compulsion to

appear before the grand jury or to submit any evidence. And there is no reason to believe that petitioners are about to be indicted. On the contrary, petitioners testified under grants of immunity, and they have not been identified as targets of the grand jury's investigation. Thus, petitioners have clearly not made the threshold Article III "showing of any real or immediate threat that [they] will be wronged." *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 111 (1983). See generally *O'Shea* v. *Littleton*, 414 U.S. 488, 494 (1974) (citations omitted) ("Abstract injury is not enough. It must be alleged that the plaintiff 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged statute or official conduct. * * * The injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.' ").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

EDWARD S.G. DENNIS, JR.
Acting Assistant Attorney General

SARA CRISCITELLI
Attorney

JUNE 1988

U.S. GOVERNMENT PRINTING OFFICE 1988—202 037/60496

No. 87-1607

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BARRY SILVERSTEIN AND DENNIS J. MCGILLICUDDY,
Petitioners,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

REPLY BRIEF FOR PETITIONERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

ROBERT L. WEINBERG
Counsel of Record
LAWRENCE LUCCHINO
JOHN D. CLINE
GREGORY A. BAER
WILLIAMS & CONNOLLY
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000

JOHN GERMANY
HOLLAND & KNIGHT
600 North Florida Avenue
Tampa, Florida 33602
(813) 223-1621

GARY R. TROMBLEY
JAMES H. KYNES
WINKLES, TROMBLEY, KYNES
& MARKMAN, P.A.
Tampa Theater Building
707 North Franklin Street
Tampa, Florida 33602
(813) 229-7918
Attorneys for Petitioners

June 21, 1988

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1607

BARRY SILVERSTEIN AND DENNIS J. MCGILLICUDDY,
Petitioners,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

REPLY BRIEF FOR PETITIONERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The Brief for the United States in Opposition to the petition for certiorari ("Opp.") provides no support for the court of appeals' decision and fails to resolve the conflict between that decision and precedent from this Court and the other courts of appeals.[1] Accordingly, the

---

[1] Moreover, the government does not dispute that an important question of federal law is in issue. That importance stems especially from the effect of the court of appeals' decision on enforcement of the ethical duties prescribed by the ABA's Model Rules of Professional Conduct (as incorporated in the rules of the various federal district courts), and the problems the decision creates for

writ should be granted, and this Court should decide whether Article III precludes a federal court from adjudicating a motion to disqualify counsel involved in a pending grand jury proceeding before the actual harm that the motion seeks to prevent has occurred.

ARGUMENT

The government contends that Article III prevents federal courts from correcting ethical violations of government counsel before a grand jury unless "coercive action" has been taken against the complainant. (Opp. 3). The decisions of this Court mandate no such delay in righting the wrongs or threatened wrongs of prosecutors; to the contrary, as the cases cited by petitioners demonstrate, Article III empowers federal courts to correct such violations prophylactically.[2]

In support of its "coercive action" theory, the government relies on *Laird v. Tatum*, 408 U.S. 1 (1972), which it claims has "great force" in this context. (Opp. 3) But the facts and legal principles at issue in *Laird* are quite different from those present here. In *Laird*, the petitioners claimed that investigative and data-gathering activity by the Army was chilling their speech and thus violating their First Amendment rights. Their claim did not constitute an Article III case or controversy, the Court held, because they did not allege that *they* were currently being investigated by the Army or were even likely to be investigated in the future; instead they ar-

---

federal prosecutors seeking to disqualify attorneys representing multiple witnesses before a grand jury. *See* Pet. 6-7.

[2] Article III requires:

> that a plaintiff allege he has suffered actual or threatened injury at the hands of the defendant, fairly traceable to the unlawful conduct, and likely to be redressed by the requested relief.

Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 472 (1982) (citations omitted).

gued that their rights were "being chilled by the mere existence, without more," of the Army's activity—that is, that their knowledge that *others* were being investigated chilled their speech. *Id.* at 10.

In contrast to *Laird*, and as demonstrated in the petition, the actions of the particular United States Attorney involved in this case—branding petitioners as wrongdoers on the public record, investigating one of petitioners after having had access to his immunized testimony, unilaterally abrogating the government's immunity agreement with one of the petitioners, and subpoenaing petitioners before the special grand jury—were all directed at petitioners.[3]

Thus, without any pertinent authority, the government claims that federal courts are virtually powerless to review pre-indictment conduct by a federal prosecutor. The government's argument rests on the claim that "[t]he United States Attorney, like the grand jury, 'must be free to pursue [his] investigations unhindered by external influence or supervision.' *United States v. Dionisio*, 410 U.S. 1, 17 (1973)." (Opp. 4) But a complete reading of the *Dionisio* passage shows that this Court placed its trust in the *grand jury*, and *not* in the prosecutor. Nothing in *Dionisio* suggests that a federal prosecutor appearing before a grand jury is freed from the ethical constraints under which all other attorneys labor, or that challenges to his pre-indictment conduct are prevented by Article III.

Apart from its apparent attempt to free federal prosecutors before the grand jury from judicial enforcement of ethical constraints, the government argues that there is

---

[3] *See* Pet. 3, 13a-14a. Petitioners' reading of *Laird*, and the distinction they draw between *Laird* and this case, have some precedent in this Court. *See Socialist Workers Party v. Attorney General*, 419 U.S. 1314, 1318-19 (1974) (Marshall, J., sitting as Circuit Justice on application for stay).

no conflict between the decision of the court below and decisions of other federal courts that have adjudicated grand jury disqualification motions. To this end, the government notes that only one of the cases cited by petitioners involved a motion to disqualify a prosecutor conducting a grand jury investigation (as opposed to counsel for a grand jury witness or for a target of the prosecutor) and that, even in that case, the court did not "discuss" whether the motion to disqualify presented an Article III controversy. (Opp. 5) For the reasons set out below, the government's attempt to reconcile the cases cited by petitioners with the court of appeals' decision in this case is unpersuasive.

First, the government provides no rationale or authority for ignoring those cases where a court disqualified private counsel, as opposed to prosecutors. As petitioners have noted, without rebuttal from the government, "there is no principled basis for distinguishing . . . between a prophylactic government motion to disqualify counsel for grand jury witnesses, and a prophylactic motion by a witness to disqualify government counsel." (Pet. 7) Deciding the *merits* of such motions may involve the weighing of different factors, but the process for deciding whether they present a case or controversy for Article III purposes is the same. The threatened injury from an alleged breach of an ethical rule is sufficient to invoke the power of the federal judiciary to decide whether the prophylactic remedy of disqualification is merited, whether it be disqualification of private counsel, a prosecutor, or other government counsel. Thus, the admonition of the court in *In re Gopman*, 531 F.2d 262 (5th Cir. 1976), that "[w]e . . . must remember that the court's discretion permits it 'to nip any potential conflict of interest in the bud,'" *id.* at 266 (quoting *Tucker v. Shaw*, 378 F.2d 304, 307 (2d Cir. 1967)), is equally applicable to this case. The court of appeals' decision therefore represents a break with precedent.

The government's attempt to distinguish *In re April 1977 Grand Jury Subpoenas*, 573 F.2d 936 (6th Cir. 1978), *appeal dism'd*, 584 F.2d 1366 (6th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 934 (1979), is equally unavailing. The government notes that the court in that case did not discuss Article III. (Opp. 5) Federal courts, however, are obligated to examine whether they have jurisdiction—under Article III and otherwise—before proceeding to the merits of a case. "It is basic to our jurisprudence that 'the first and fundamental question is that of jurisdiction . . . . This question the court is bound to ask and answer for itself, even when not otherwise suggested and without respect to the relation of the parties to it.'" *Marshall v. Local Union No. 639*, 593 F.2d 1297, 1301 n.16 (D.C. Cir. 1979) (quoting *Mansfield, Coldwater & Lake Michigan Ry. v. Swann*, 111 U.S. 379, 382 (1884)); *see Judice v. Vail*, 430 U.S. 327, 331 (1977). Therefore, the order terminating the grand jury investigation by the panel in *In re April 1977 Grand Jury Subpoenas* necessarily implied that the panel had determined that an Article III case or controversy was presented, and the action of the en banc court—in determining that there was no *statute* conferring *appellate* jurisdiction to review the district court's order denying disqualification of government counsel in the grand jury proceeding—necessarily presupposed that the district court had jurisdiction authorized by Article III to entertain and adjudicate the motion to disqualify.[4]

---

[4] *See also In re Special February 1977 Grand Jury*, 581 F.2d 1262, 1263-65 (7th Cir. 1978); *In re Grand Jury Empanelled January 21, 1975*, 536 F.2d 1009, 1011-13 (3rd Cir. 1976). As in *In re April 1977 Grand Jury Subpoenas*, the fact that the courts in these cases adjudicated the procedural and substantive issues raised by the parties demonstrates the courts' belief that those issues presented a case or controversy under Article III.

CONCLUSION

For the foregoing reasons, and for the reasons advanced in their petition, petitioners respectfully submit that the petition for writ of certiorari should be granted.

Respectfully submitted,

ROBERT L. WEINBERG
Counsel of Record
LAWRENCE LUCCHINO
JOHN D. CLINE
GREGORY A. BAER
WILLIAMS & CONNOLLY
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000

JOHN GERMANY
HOLLAND & KNIGHT
600 North Florida Avenue
Tampa, Florida 33602
(813) 223-1621

GARY R. TROMBLEY
JAMES H. KYNES
WINKLES, TROMBLEY, KYNES
& MARKMAN, P.A.
Tampa Theater Building
707 North Franklin Street
Tampa, Florida 33602
(813) 229-7918
Attorneys for Petitioners

June 21, 1988